

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	HPA Docket No. 01-0008
	)	
BEVERLY BURGESS, an individual,	)	
GROOVER STABLES, an unincorporated	)	
association; WINSTON T. GROOVER,	)	
JR., also known as WINKY GROOVER,	)	
an individual,	)	
	)	
Respondents	)	<b>Decision and Order</b>

This is an administrative disciplinary proceeding that the Administrator of the Animal and Plant Health Inspection Service initiated by filing a Complaint on November 6, 2000, that charges the Respondents with violating the Horse Protection Act (15 U.S.C. §§1821-1831; "The Act"). Specifically, Respondent Winston T. Groover, Jr., also known as Winky Groover, a professional horse trainer who does business as Groover Stables is alleged to have violated the Act by transporting and exhibiting the Tennessee Walking Horse "Stocks Clutch FCR" while the horse was "sore" within the meaning of the Act. Respondent Beverly Burgess who owns Stocks Clutch FCR, is alleged to have violated the Act by allowing Respondent Groover to exhibit her horse at the horse show while it was sore.

Respondents filed their Answer to the Complaint on December 21, 2002, in which they denied violating the Act. An evidentiary hearing was held on June 26-27, 2002, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C.. Respondents were represented by Brenda S. Bramlett, Esq., Bramlett and Durard, Shelbyville, TN. The hearing was recorded and exhibits were received in evidence from

both Complainant and Respondent. Transcript references are designated by "Tr."

Complainant's Exhibits are designated by "CX". Respondents' Exhibits are designated by RX."

Subsequent to the hearing, Judge Baker retired and is not available to issue the decision and order in this proceeding. It was initially reassigned to another Administrative Law Judge who is also presently unavailable. It was thereupon reassigned to me. When this case was first reassigned, Respondent filed a Motion for a New Trial that was considered and denied by Order entered on October 15, 2003. The denial of the Motion was based on Section 1.144(d) of the controlling Rules of Practice which provides that: "... (1) in case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge."

Under the most recent briefing schedule, the time for filing briefs concluded on March 12, 2004. Upon consideration of the record evidence and the briefs and arguments by the parties, I have decided that Respondent Groover violated the Act by exhibiting a horse while the horse was sore and that a civil penalty should be assessed against him in the amount of \$2,200. Furthermore, Respondent Groover should be disqualified for one year from horse industry activities as provided in the Act.. I have also decided that under the standard for determining whether a horse owner has "allowed" a sore horse to be exhibited that applies in the Sixth Circuit where an appeal of this proceeding would lie, the charges against Respondent Burgess should be dismissed.

The findings of fact, conclusions and the discussion that follow specify and explain the reasons for the attached order. In reaching these findings and conclusions, I have fully

considered the briefs, motions and arguments by the parties and, if not adopted or incorporated within these findings and conclusions, they have been rejected as not in accord with the relevant and material facts in evidence or controlling law.

#### Finding of Facts

- 1) Respondent Winston T. Groover, Jr., is the sole proprietor of Groover Stables, whose mailing address is Post Office Box 1435, Shelbyville, Tennessee 37162  
(Answer, para 1).
- 2) Respondent Winston T. Groover, Jr., also known as Winky Groover, is an individual whose mailing address is Post Office Box 1435, Shelbyville, Tennessee 37162  
(Answer, para 2).
- 3) Respondent Beverly Burgess is an individual whose mailing address is 351 Highway , 82 East, Bell Buckle, Tennessee 37020. At all times material herein, Respondent Beverly Burgess was the owner of the horse known as “Stocks Clutch FCR” (Answer, para 3).
- 4) On or about July 7, 2000, Respondent Winston T. Groover, Jr., transported Stocks Clutch FCR to the Cornersville Lions Club 54<sup>th</sup> Annual Horse Show for the purpose of showing and exhibiting the horse as entry number 43 in class number 20 (Answer, para 4).
- 5) The United States Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS) assigned personnel to monitor the Cornersville Show. They included Dr. David Smith and Dr. Sylvia Taylor, employed by APHIS as Veterinary Medical Officers (VMOs); and Michael Nottingham, employed by APHIS as an Investigator (Tr. Vol. 1, pages 18-22 and 50).
- 6) The duties of the VMOs at the horse show were to look out for and “write up” “sored”

horses and to make sure the “Designated Qualified Persons” (DQPs) employed by the organization certified by APHIS to manage the horse show, were doing an effective role of enforcing the Horse Protection Act. (Tr. Vol 1, page 44).

- 7) The VMOs followed the practice of asking to examine the second and third place horse post show. The DQPs examined all first place horses (Tr. Vol 1, page 44).
- 8) On July 7, 2000, Stocks Clutch FCR, upon being exhibited at the Cornersville Show, was designated by the Horse Show as the second place horse in its Class and for that reason was examined post show by Dr. David Smith (CX 5).
- 9) Dr. Smith did not have any present recollection of the horse or his examination of it on July 7, 2000, when he testified at the hearing on June 26, 2002. The horse show had taken place on the night of July 7, 2000, and Dr. Smith prepared his affidavit the next morning based on his notes and his memory from the night before. He no longer had the notes when he testified at the hearing and his reading of his affidavit did not refresh his recollection. His testimony about the horse's condition when he examined it consists entirely of his affidavit (CX 5) and APHIS Form 7077 (CX 4), which he helped prepare (Tr. Vol. 1, pages 45-48)
- 10) Dr. Smith observed, as set forth in his affidavit, that:

“... the horse was slow to lead as the custodian walked it. When I examined the horse's forefeet, I found an area painful to palpation along the lateral aspect of the left forefoot just above the coronary band. The pain was indicated as the horse tried to pull its foot away each time I applied gentle pressure with the ball of my thumb to this location. It was consistent and repeatable. I indicated the position of the painful area in the drawings at the

bottom of APHIS Form 7077 corresponding to this case. The palmar aspect of the left fore pastern had many deep folds, corrugations and nodular areas consistent with a scar rule violation. Although the skin in this area was pigmented, I could see reddening and swelling consistent with a scar rule violation. I found reddened, swollen corrugations on the palmar aspect of the right foot.”

- 11) After his examination of Stocks Clutch FCR, Dr. Smith asked Dr. Sylvia Taylor to examine the horse. Dr. Smith did not tell Dr. Taylor what he had found and did not observe her examination. (CX 5, page 2).
- 12) At the hearing on June 26, 2002, Dr. Sylvia Taylor also did not have a present memory nor could her recollection be refreshed respecting her examination of Stocks Clutch FCR on July 7, 2000. (Tr. Vol 1, pages 162-163).
- 13) Dr. Taylor prepared her affidavit at 11: 20 p.m. on July 7, 2000, shortly after the end of the show and her examination of Stocks Clutch FCR (CX 6, page 3 and Tr. Vol 1, page 164). Dr. Taylor also contemporaneously helped prepare APHIS Form 1077 (CX 4)
- 14) Dr. Taylor recorded in her affidavit that:

“On July 7, at approximately 8:50 p.m., Dr. Smith examined a black stallion, Stocks Clutch, entry 43, in Class 20, after placing 2<sup>nd</sup>. I observed that the horse walked and completed a turn around the cone normally, but as it went straight after the turn it was reluctant to go and the rein was pulled tight to continue leading it. I observed Dr. Smith approach the left side of the horse and lift the foot and palpate it in the customary manner. I noticed that the horse flinched its shoulder and neck muscles and shifted its weight while he palpated the left pastern, but I did not observe whether this response was consistently

localized to palpation of any particular part of the pastern, other than that it was not the posterior pastern. He then palpated the right pastern, and I did not see a similar response. Dr. Smith then asked me to examine the horse.

I observed the horse walk and turn again. It walked and turned around the corner normally, but as it left the turn it was reluctant to lead and the custodian had to pull the horse along on a tight rein. I approached the horse on the left, established contact and began palpating the left posterior pastern. I noticed that there was very pronounced, severe scarring of the skin of the posterior pastern. There were thickened ropes of hairless skin medial and lateral to the posterior midline, bulging into even thicker, hard corrugations and oval nodules along the medial-posterior aspect. This epithelial tissue was non-uniformly thickened and could not be flattened or smoothed out. Grooves and cracks on the lateral and midline area above the pocket were reddened. When I palpated the lateral and antero-lateral pastern, the horse attempted to withdraw its foot and I could feel its shoulder and neck muscles tighten and pull away. I obtain(ed) this response consistently and repeatedly three times, always when palpating that same spot.”

When I palpated the right posterior pastern, I observed that it was also very scarred. There were non-uniformly thick cords of epithelial tissue with hairloss, that also could not be flattened or smoothed out, some of which were also reddened. I noticed the horse flinched and twitched several times while I palpated the posterior pastern over these scars, but the response was not localizable to a particular area. I then palpated the anterior right pastern and did not detect a pain response.”

- 15) In the professional opinions of both Dr. Smith and Dr. Taylor, the horse was both

- unilaterally sore and in violation of the scar rule. In the professional opinion of each of them, the horse was sore due to the use of chemical and/or mechanical means in violation of the Act and was in violation of the scar rule regulations then in effect. (CX 5 and CX 6)
- 16) Dr. Smith and Dr. Taylor wrote up the horse for being in violation and completed APHIS Form 7077, Summary of Alleged Violations (CX 4).
  - 17) The VMOs testified they do not write up a horse as being in violation unless they both agree that the horse is sore and in violation of the Act ( Tr. Vol 1, pages 136 & 168).
  - 18) After the examination by the VMOs, the Horse Show's "Designated Qualified Persons", Charles Thomas and Andy Messick, examined the horse.
  - 19) A Designated Qualified Person (DQP) is a "person meeting the requirements of paragraph 11.7 of the Horse Protection Regulations." who is delegated authority under Section 4 of the Act to detect horses which are "sore" (Respondents' Exhibit 7, RX 7, page 30). The National Horse Show Commissioner's DQP program which employs Mr. Thomas and Mr. Messick as DQPs, is certified by the Department of Agriculture (Tr. Vol 1, pages 86 and 228). The training of DQPs is akin to that of VMOs in that they attend annual training programs together that are given by APHIS. (Tr. Vol 1, page 87). Mr. Thomas and Mr. Messick are both highly qualified and experienced DQPs, but neither is a veterinarian as are the likewise highly qualified and experienced VMOs. The duties of DQPs are not full time; Mr. Messick is principally employed as an attorney and Mr. Thomas is retired. (Tr. Vol 2, pages 3 & 29-30).
  - 20) After the examinations by the VMOs, Mr. Messick was the first DQP to examine Stocks Clutch FCR. After reviewing his exam sheet, Mr. Messick had a present recollection of

his examination of the horse some two years before the hearing (Tr. Vol 2, page 10). He was the same DQP who had passed the horse for exhibition and showing based on his pre-show inspection in which he found the horse met the industry standards. (Tr. Vol 2, pages 10-16). He did not watch the VMOs examine the horse post show (Tr. Vol 2, page 17). Mr. Messick's post show examination of the horse was about 5-10 minutes after its examination by the VMOs. He testified that as was the case pre-show, the horse still had soft, uniformly thickened tissue and he didn't get any withdrawal response on his palpation on the left or right foot (Tr. Vol 2, page 19). He did not observe swelling or redness of the posterior pastern of either foot. (Tr. Vol 2, pages 19-20).

- 21) Mr. Thomas next examined the horse. He and Mr. Messick were asked to do so by Respondent Groover who told them that the VMOs "had taken information on him in the scar rule." Since Andy Messick was the first one to check the horse pre-show, he also checked him first post show. (Tr. Vol 2, page 37). Mr. Thomas' predominant concern appeared to be whether the horse was in violation of the scar rule. He didn't believe it was, "He did have some raised places... but they were soft and pliable. That's what we were ---- in our training, what we were required ---- as long as they were soft, we could take our thumb and stretch them and flatten them out or press them and they flatten out, and they were only in the back. Nothing though, around the edge." (Tr. Vol 2, page 39)
- 22) In Mr. Thomas' opinion, the horse was not in violation of the scar rule and he did not find abnormal reactions when he palpated the horse's front pasterns. (Tr. Vol 2, page 40).
- 23) At 10:40 a.m, DST, on July 7, 2000, apparently two hours subsequent to the examinations of Stocks Clutch FCR by the VMOs, the horse was examined by Dr. Randall

T. Baker. Dr. Baker is a Veterinarian in private practice for 25 years who is licensed in Tennessee and is a member of the American Association of Equine Practitioners (RX 13 and Tr. Vol 1, pages 298 and 305-306). At the hearing, Dr. Baker had present recollection of his examination which was videotaped and requested by Respondents. (Tr. Vol 1, page 309). He did not find the horse's front pasterns to be sore and believed the scars on the pasterns of each pastern did not violate the scar rule (Tr. Vol 1, pages 311-321). Although he found some hair loss and thickened epithelial tissue on both posterior pasterns, Dr. Baker concluded that the scar rule was not violated because when he put his palm on the back of the horse's foot, he didn't have excess tissue coming out from there and the tissue was pliable and not real firm granulation type tissue; it would spread around and cleave under his thumb (Tr. Vol 1, pages 321-322). He saw no evidence of scarring or redness on either the left or right posterior pasterns. (Tr. Vol 1, page 324).

24) Respondent Beverly Burgess testified, and Respondent Winston Groover corroborated, that prior to July 7, 2000, and on several occasions Ms. Burgess instructed the trainer of her horse, Stocks Clutch FCR, not to "sore" the horse or perform any act which would cause it to be noncompliant with the Horse Protection Act (Tr. Vol 2, pages 57-58 and 92). She further testified that she visited Groover's Stable two or three times a week to assure herself that her horse was not sore or in violation of the scar rule (Tr. Vol 2, page 54).

Mrs. Burgess did not exhibit, assist in preparing for show, enter or transport Stocks Clutch FCR to the Cornersville Horse Show on July 7, 2000 (Tr. Vol 2, pages 50-51)

25) Respondent Beverly Burgess watched the VMOs inspect her horse and in her opinion Dr. Taylor "was not a horse person" because she appeared to have trouble picking up the

horse's foot and went at it in an awkward way (Tr. Vol 2, page 52). Respondents also presented testimony from Mr. Lonnie Messick, the Executive Vice-President and DQP coordinator for the National Horse Show Commission, and DQP Andy Messick's father, that he had once seen Dr. Taylor hold a horse's foot in an improper manner that caused it to jerk its foot away from her (Tr. Vol 1, pages 223, 227, 266 and 271-273). However, he further testified that he had been with Dr. Taylor at other horse shows and she seemed competent (Tr. Vol 1, page 273)

- 26) Respondent Winston Groover has been a professional horse trainer since 1975. He has attended DQP clinics and read various publications on determining whether a horse is in compliance with the Act. He testified that he transported, entered and showed Stocks Clutch FCR on July 7, 2000, at the Cornerville Horse Show where it was awarded 2<sup>nd</sup> place in Class 20 (Tr. Vol 2, pages 91-95). No evidence has been entered and no argument has been made to show any prior violations of the Act by Mr. Groover.

### The Act and The Scar Rule

#### A. The Act

The Act defines the term "sore" as:

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection

with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the state in which such treatment was given. 15 U.S.C. § 1821.

The Act prohibits the following conduct respecting a “sore” horse:

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is “sore”, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is “sore”, (C) selling, auctioning or offering for sale, in any horse sale or auction, any horse which is “sore” and (D) allowing any activity described in clause (A), (B) or (C) respecting a horse which is “sore” by the owner of such horse, ..... 15 U.S.C. § 1824(2).

The Act provides that a horse is presumed to be “sore” in the following circumstances:

(d)...(5) In any civil or criminal action to enforce this “Act” or any regulation under this “Act” a horse shall be presumed to be a horse which is “sore” if it manifested abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs 15 U.S.C. § 1825 (d)(5)

The Act provides for civil penalties and disqualification from various horse industry activities as follows:

(b) (1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000<sup>1</sup> for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such civil penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

\* \* \* \* \*

(e) In addition to any fine, imprisonment or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or

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<sup>1</sup> Pursuant to the Federal Civil Penalties Adjustment Act of 1990, the penalty has been adjusted for inflation to \$2,200. 7 C.F.R § 3.91 (b) (2) vii.

who paid a civil penalty assessed under subsection (b) of this section or is subject to final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. 15 U.S.C. 1825 (b)(1) and (e).

The Act authorizes the Secretary to issue rules and regulations as he deems necessary to carry out the provision of this chapter.

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter. 15 U.S.C. § 1828.

### B. The Scar Rule

The Scar Rule as published by APHIS, on April 27, 1979, in 44 Fed. Reg. 25, 172, provides:

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be “sore” and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follow:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (external surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or “pocket” may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation. 9 C.F.R. § 11.3.

### Conclusions

1. The horse “Stocks Clutch FCR” was a “sore” horse when it was exhibited by Respondents Winston T. Groover, Jr. and Groover Stables, on July 7, 2000, as entry 43 in class number 20 in the Cornersville Horse Show.
2. Respondent Winston Groover should be assessed a civil penalty of \$2,200 and made Subject to a one year disqualification from horse industry activities as provided in the Act.

3. Respondent Beverly Burgess, the owner of the horse "Stocks Clutch FCR", is not found to have allowed the showing of the horse while it was sore under the standards specified by the Sixth Circuit where an appeal of the case would lie.
4. The case against Respondent Beverly Burgess should be dismissed.

### Discussion

#### (1) The horse was sore when exhibited

Two competent, highly qualified veterinarians employed by the Department of Agriculture inspected Stocks Clutch FCR after it was awarded second place in its class at the Cornersville Horse Show on the night of July 7, 2000. The veterinarians each examined the horse separately and independently. Each independently concluded that the horse was sore. It was only because both agreed on their findings that the owner and trainer were charged with violating the Act. Neither VMO can be said to have any reason to have made a false or frivolous accusation. The accusation that one of them, Dr. Sylvia Taylor, "was not a horse person" and did not know how to handle a horse's feet is patently absurd. Dr. Taylor has been a veterinarian since 1986 and for some ten years, her exclusive duties for APHIS concerned enforcement of the Horse Protection Act. The only witness offered in corroboration of the charge made by Respondent Beverly Burgess, admitted on cross examination that Dr. Taylor was indeed competent. Dr. Taylor and Dr. Smith, the other APHIS Veterinarian who found the horse to be sore, were in fact considered by APHIS to possess such special competence in this field that another veterinarian was with them at the horse show for their training.

Dr. Taylor and Dr. Smith found the horse to be sore on two separate bases.

First, they each found an area painful to palpation along the lateral aspect of the left forefoot. The horse pulled its foot away from the VMOs each time thumb pressure was

applied to palpate this area. Each VMO palpated the area repeatedly and the horse's pain response was constant.

Second, both VMOs observed scars on the posterior of both of the horse's front pasterns which each VMO found to be in the violation of the Scar Rule. In an attempt to make the Scar Rule generally understandable to all who inspect Tennessee Walking Horses for evidence of soring, APHIS has issued various publications illustrating its proper application. RX 2 is one of them. It was used as an aid in the cross examination of Drs. Smith and Taylor. Pages 16 and 17 of the exhibit show horse pasterns that have ridges and furrows present that do not appear to be "uniformly thickened" as required for a horse not to be considered "sore" under the Scar Rule. However, the caption beneath Figure 11 A on page 16 of RX 2 states, "if these can be smoothed out with the thumbs (see fig. 8) these would not be violations." And here lies the whole of Respondents' defense.

Both of the DQPs and Dr. Baker who examined the horse subsequent to the VMOs, believed that the horse's scars came within these exemptions. Each of them testified that the scars were pliable and could be flattened. But to be considered "flattened" and therefore the "uniformly thickened epithelial tissue" that may be allowed under the Scar Rule, all bumps, grooves, and ridges must, as shown in Figure 8 on page 13 of RX 2, completely disappear when outward pressure is being applied to the site by an examiner's two thumbs. Apparently, the DQPs and the private veterinarian were using a less exacting standard.

Moreover, since the DQPs had not spoken to the VMOs before their examination, they erroneously thought the violation was confined to the Scar Rule. This probably led them to concentrate their examinations of the horse's pasterns to the scarred posterior areas and to not fully palpate the horse's left anterior pastern where the VMOs had elicited pain responses.

Additionally, when Dr. Randall examined the horse some two hours later, the pain in the left anterior pastern may have by then sufficiently subsided so as to be no longer detectable.

It has repeatedly been found that DQP examinations have less probative value and are entitled to less credence than examinations by veterinarians employed by the United States Department of Agriculture. In re: Larry E. Edwards, et al, 49 Agric. Dec. 188, 200 (1990). So too, a later examination by a private veterinarian is not given as much weight as the more immediate examination by two USDA veterinarians. *Id.*, at 200-201.

For these reasons, I have concluded that Stocks Clutch, FCR was a sore horse when it was exhibited in the horse show.

(2) Respondent Groover should be assessed a \$2,200.00 civil penalty and disqualified for one year.

The act provides for the assessment of a civil penalty of up to \$2,200.00 for each violation of its provisions and authorizes disqualification from participating in specified horse industry activities for not less than one year for the first violation and not less than five years for any subsequent violation. 15 U.S.C. §1825 (b) and (e).

When determining the appropriate civil penalty and whether to impose disqualification, the Act requires consideration of the following factors (15 U.S.C. §1825(b)(1)):

... all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business and such other matters as justice may require.

As pointed out, In re: Bennett, 55 Agric Dec 176, 188 (1996): “as a result of the Scar Rule, the soring seen today... is far more subtle...”

Therefore, even though the soring of Stocks Clutch FCR may appear less severe than the

sored horses described in past cases, it is notable because it occurred while the horse was under the control of an experienced, knowledgeable horse trainer. As such, Mr. Groover was required to know the limitations the Act presently places on his training practices for a horse he exhibits not to be found in violation of the Act. Unless a professional horse trainer such as Mr. Groover is held strictly accountable for any horse in his care that is found to have been exhibited while sore, the Act is without meaning.

A sanction must necessarily be assessed against Mr. Groover that will serve as a meaningful deterrent against his employment of excessive training techniques in the future. No one but Mr. Groover was responsible for the soring of the horse. Stocks Clutch FCR was in his care for about a year before the show. (Tr. Vol 2, page 54). Respondents admit that it was Mr. Groover who entered and exhibited the horse and all responsibility for the condition was his alone and that Respondent Burgess was in no sense responsible (Respondents' Brief , page 2, 1<sup>st</sup> sentence of 3<sup>rd</sup> paragraph). It is therefore found that all culpability for the horse being found "sore" rests with Mr. Groover.

For the reasons previously stated, whenever an experienced, knowledgeable, trainer exhibits a "sored" horse, it must be found that his conduct, absent a credible and meaningful excuse or explanation, is in every respect egregious. Respondent has not contested his ability to pay the \$2,200.00 civil penalty authorized under Act for a horse soring violation and that is the appropriate civil penalty to be assessed in these circumstances.

The Act also authorizes the disqualification for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Complainant seeks the imposition of a one year disqualification. This will affect Mr. Groover's ability to engage in

business. But again, in order to have a meaningful deterrent against employing excessive training techniques in the future, I have concluded that his disqualification for one year is needed and appropriate.

(3) and (4) The Complaint as against Respondent Beverly Burgess should be dismissed.

Any appeal of this case will lie in the Sixth Circuit. The controlling law in the Sixth Circuit on whether a horse owner can be held to have “allowed” a sore horse to be shown is set forth in Baird v United States Department of Agriculture, 39 F. 3d 131 (6<sup>th</sup> Cir. 1994). The Sixth Circuit in Baird, 39 F. 3d, at 136, reviewed the Eighth Circuit’s decision in Burton v. United States Department of Agriculture, 683 F. 2d 280 (8<sup>th</sup> Cir. 1982). Baird agreed with Burton that 15 U.S.C. § 1824 (2) (D) did not impose a strict liability standard on owners for the actions of their trainers. But instead of the hard-and-fast, three-prong test set forth in Burton for determining whether an owner “allowed” his or her horse to be exhibited or shown while “sore”, the Sixth Circuit elucidated a somewhat different standard for the determination, 39 F. 3d, at 137:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824 (2) (D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonition the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is actually conduct violative of § 1824.

In applying this standard, Baird, 39 F 3d, at 138, held that upon an owner testifying he directed his trainers not to sore his horses, the government must offer evidence to contradict him so as to establish pretext. It is not enough for the government to assert that the testimony was self-serving and less than truthful. At a minimum, Complainant must offer some evidence in contradiction of this testimony by the owner. In the instant case, no contradicting evidence was introduced by Complainant.

Complainant has also asked that instead of following Baird, we apply a contrary interpretation of an owner's liability by the District of Columbia Circuit where an appeal could also lie. That Circuit has held that an owner may be liable for the actions of her trainer irrespective of her testifying that she instructed the trainer not to "sore" her horse. Crawford v. U.S. Department of Agriculture, 50 F. 3d 46, 51 (DC Cir 1995).

However, only Respondents and not Complainant can appeal a final decision in this proceeding. It is absurd to suggest that Respondents would choose to file an appeal in the District of Columbia Circuit instead of the Sixth Circuit where they reside. What Complainant really suggests is that the Secretary follow a policy of non-acquiescence to the Sixth Circuit decision. To do so, might well provoke that Circuit's outrage upon the case's appeal; the kind of outrage that ensued in the face of the HHS policy of non-acquiescence to Ninth Circuit precedents. *See, Richard J. Pierce, Jr., Sidney A. Shapiro, and Paul R. Verkuil, Administrative Law and Process*, 393-97 (3d ed. 1999)

For the various reasons discussed, Respondent Beverly Burgess cannot be found to have "allowed" her horse to be shown while sore under the standards applicable in the Sixth Circuit. The Complaint as against her should be dismissed. The following Order is therefore issued.

**ORDER**

On this 21<sup>st</sup> day of April 2004, the following **ORDER** is herewith issued:

1. Respondent Winston T. Groover, Jr., is assessed a civil penalty of \$2,200. The civil monetary penalty shall be paid by cashier's check(s) or money order(s), made payable to order of the **Treasurer of the United States**, marked with HPA Docket No. 01-0008, deposited with a commercial delivery service such as Fedex or UPS, for receipt by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue SW, Room 2325D, South Building Stop 1417 Washington, D.C. 20250-1417
2. Respondent Winston T. Groover, Jr., is disqualified for one year from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction.
3. The Complaint in respect to Respondent Beverly Burgess is dismissed with prejudice.

The deadline for receipt of the civil monetary penalty shall be, and the effective date of the disqualification shall be, and this Decision and Order shall become final and effective one day after the time for filing an appeal from this Decision and Order has expired without an appeal having been filed.

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VICTOR W. PALMER  
Administrative Law Judge

